Kesang Leasing Sdn Bhd v Tetuan Zul Rafique & Partners (sued as a firm)

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCVC-902–09 OF 2011
JOHN LOUIS O'HARA J
11 MARCH 2014

Evidence — Burden of proof — Burden on party who would fail if no evidence given — Claim for professional negligence — Whether proven — Evidence Act 1950 s 102

Legal Profession — Duty of care — Negligence — Breach — Claim against solicitors — Whether defendant breached duty of care to plaintiff — Standard of ordinary skilled man exercising and professing to have that special skill — Whether negligence proven

Tort — Negligence — Duty of care — Breach — Standard of care — Whether standard of ordinary skilled man exercising and professing to have that special skill satisfied

Tort — Negligence — Professional negligence — Claim against solicitors — Whether defendant breached duty of care to plaintiff — Standard of ordinary skilled man exercising and professing to have that special skill — Whether negligence proven

The plaintiff's claim against the defendant was for professional negligence. It was alleged that the defendant had breached its duty of care to the plaintiff, inter alia, in: (i) failing to give legal advice regarding the steps that should be taken and the required preparation for the purpose of a full trial; (ii) failing to call relevant witnesses; (iii) failing to advise the plaintiff regarding the effect of primary evidence and secondary evidence in producing documents at trial; and (iv) failing to advise PW1 to give an explanation as to why the original SPA of the said two units of apartments could not be produced. The defendant denied the plaintiff's allegations of professional negligence in the conduct of Suit No S3–193 of 1996. It was contended that, the loss, if any, was caused by the plaintiff's own failure to procure the relevant original sales and purchase agreements and the plaintiff's failure to secure the appropriate witnesses despite being advised by the defendant and/or counsel in charge to do so.

Held, dismissing the claim with costs of RM60,000:

(1) Section 102 of the Evidence Act 1950 states that the burden is on the party who would fail if no evidence is given by either party. Since both parties called witnesses; the burden of proof was on the plaintiff and on a balance of probabilities ie to show that its case was more probable than the defendant's defence (see para 9).

(2) The plaintiff had to prove negligence as alleged in para 8(a)–(r) of its statement of claim, and it has to do so on a balance of probabilities ie that the defendant had breached its duty of care to the plaintiff. The standard to be exercised by the defendant was the standard of the ordinary skilled man exercising and professing to have that special skill (see para 12).

(3) Since the defendant as solicitors had properly instructed their counsel in the conduct of the trial and counsel ie SD4 and SD5 had not been shown to be incompetent or glaringly wrong, therefore neither the defendant as solicitors or as counsel could be said to be negligent (see para 19).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah untuk kecuaian profesional. Ia didakwa bahawa defendan telah memungkiri kewajipannya kepada plaintif, antara lain, dalam: (i) kegagalan untuk memberi nasihat undang-undang berkenaan langkah-langkah yang perlu diambil dan persediaan yang diperlukan untuk tujuan perbicaraan penuh; (ii) kegagalan untuk memanggil saksi-saksi relevan; (iii) kegagalan untuk menasihati plaintif berkenaan kesan keterangan utama dan keterangan sekunder dalam mengemukakan dokumen semasa perbicaraan; dan (iv) kegagalan untuk menasihat PW1 untuk memberi penjelasan mengapa PJB asal kedua-dua unit pangsapuri tidak dapat dikemukakan. Defendan menafikan tuduhan plaintif terhadap kecuaian profesional dalam pengendalian Guaman No S3–193 Tahun 1996. Ia dihujahkan bahawa, kerugian, jika ada, disebabkan kegagalan plaintif sendiri untuk mendapatkan perjanjian jual beli asal yang relevan dan kegagalan plaintif untuk menjamin saksi-saksi yang wajar walaupun diberi nasihat oleh defendan dan/atau peguam yang bertanggungjawab untuk berbuat sedemikian.

Diputuskan, menolak tuntutan dengan kos sebanyak RM60,000:

(1) Seksyen 102 Akta Keterangan 1950 menyatakan bahawa beban adalah ke atas pihak yang akan gagal jika tiada keterangan diberikan oleh kedua-dua pihak. Memandangkan kedua-dua pihak memanggil saksi-saksi; beban pembuktian adalah atas plaintif dan atas imbangan kebarangkalian iaitu untuk menunjukkan bahawa kesnya lebih berkemungkinan daripada pembelaan defendan (lihat perenggan 8).

(2) Plaintif perlu membuktikan kecuaian seperti yang didakwa di dalam perenggan 8(a) hingga (r) pernyataan tuntutannya, dan ia kena berbuat sedemikian atas imbangan kebarangkalian iaitu bahawa defendan telah

memungkiri kewajipannya kepada plaintif. Standard yang perlu dilaksanakan oleh defendan adalah standard orang biasa yang mahir melaksanakan dan mengaku mempunyai kemahiran khas tersebut (lihat perenggan 12).

(3) Memandangkan defendan sebagai peguamcara telah secara betul mengarahkan peguam mereka dalam pengendalian perbicaraan dan peguam iaitu SD4 dan SD5 tidak menunjukkan mereka adalah tidak berkompeten atau secara jelas salah, oleh itu defendan sebagai peguamcara atau peguam tidak boleh dikatakan adalah cuai (lihat perenggan 16).]

Notes

For cases on duty of care, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1248–1334.

For cases on negligence, see 9 *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1555–1567.

For cases on professional negligence, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1459–1549.

Cases referred to

Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593; [2007] 1 CLJ 229, FC (refd)

Maelstrom Resources Sdn Bhd & Anor v Shearn Delamore & Co And Another Case [2006] MLJU 473; [2007] 1 CLJ 50, HC (refd)

Mohd Nor Dagang Sdn Bhd v Tetuan Mohd Yusof Endut [2001] 5 MLJ 561; [2001] 2 CLJ 364, HC (refd)

Ng Poh Kwong v Tan Chuan Yong & Ors [2013] 7 CLJ 735, HC (folld)

Purves v Landell (1845) 12 Cl & Fin 91, HL (refd)

Selvaduray v Chinniah [1939] 1 MLJ 253 (refd)

Sri Alam Sdn Bhd v Tetuan Radzuan Ibrahim & Co (sued as a firm) [2010] 1 MLJ 284, HC (refd)

Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673, HC (refd)

Legislation referred to

Evidence Act 1950 s 102

S Ravichandaran (S Ravichandaran & Anuar) for the plaintiff.

Tunku Farik Ismail (Tan Sixin with him) (Azim, Tunku Farik & Wong) for the defendant.

John Louis O'hara J:

INTRODUCTION

[1] This matter came before the court as the hearing of the plaintiff's claim in encl 1.

[2] This court dismissed the plaintiff's claim and the plaintiff now appeals against that decision.

[3] In handing down its decision on 23 December 2013, the court did state that proper grounds would follow up if required. These then are the court's proper grounds.

CONSIDERATION AND FINDINGS

[4] The plaintiff's claim against the defendant is pleaded as being one for professional negligence in that the defendant is alleged to have breached its duty of care to the plaintiff in that *firma guaman defendant telah cuai dan/atau memungkiri Standard Proffession guaman yang munasabah* when it failed in its duty of care towards the plaintiff as specified in para 8(a)–(r) of its statement of claim.

[5] These were pleaded as follows:

(a) Failed to give legal advice regarding the steps that should be taken and the required preparation for the purpose of a full trial.

(b) Failure to call relevant witnesses, despite discussing the matter with the Defendant's partners, Mr. Shahul Hameed Amirudin and Mr. S. Nantha Balan, and also Ms. Rajasjree the lawyer in charge of the trial.

(c) Failure to advise the Plaintiff regarding the effect of primary evidence and secondary evidence in producing documents at trial.

(d) Failure to advise PW1 to give an explanation as to why the original SPA of the said 2 units of apartments could not be produced.

(e) Failure to take reasonable steps to fulfill the requirements of the Evidence Act 1950 regarding documentary evidence in producing the photocopies of the SPA for the said 2 units of apartments.

(f) Failing to advise PW1 to give an explanation to the Court regarding the real transaction of the ownership of the said 2 units of apartments and how the Plaintiff obtained ownership of the apartment units.

(g) Failing to advise PW1 to give an explanation to the Court as to why the strata title of the 2 units of apartments have not been obtained for 18 years.

(h) Failing to, advise PW1 to give an explanation to the Court as to the basis of his belief to Answer A22 of the Witnesses Statement.

(i) Failed to advise PW1 to give an explanation to the Court as to the identity of the individual who made copies of the SPA when the originals could not be located.

(j) Failed to advise PW1 to give an explanation as to why the SPA that were produced in Court as exhibit 'P2' and 'ID3' were not dated.

(k) Failed to advise Plaintiff to provide explanation to fulfill requirements of Section 65(1) Evidence Act 1950.

(l) Failed to call other witnesses since PW1 did not have personal knowledge of the facts in the 193 Suit, or advise Plaintiff to call other witness.

(m) Failing to take appropriate steps to obtain original SPA from Bank of Commerce and/or Developer.

(n) Failing to take appropriate steps to call witnesses from Bank of Commerce and/or Developer to produce original SPA before closing case.

(o) Failing to take appropriate steps to prove ownership of 2 units of apartments as documents were not dated and no explanation regarding making of documents.

(p) Failing to research and analyze the relevant law relating to the issues in the 193 Suit prior to full trial.

(q) Failing to exhibit a reasonable professional standard or adopt the requisite principles of law during the said trial.

(r) Other negligence proved during the trial.

[6] As a consequence of the defendant's alleged negligence resulting from the breach of its duty of care, the plaintiff claims it suffered loss of:

RM973,783.37 in regard to Apartment A10-4;

RM558,170.79 in regard to Apartment A 5-4;

RM100,000.00 as legal costs;

totaling RM1,631,954.16 plus interest or in the alternative damages and interest to be assessed by the court.

[7] The defendant in its defence and rejoinder has denied the plaintiff's allegations of professional negligence in the conduct of S3–193 of 1996 ('the 193 Suit') by the partners and lawyers handling the matter. The loss, if any, was caused by the plaintiff's own failure to procure the original sales and purchase agreements ('the SPA') for both units and provide them to the defendant's counsel in charge of the matter; and also the plaintiff's failure to secure the appropriate witnesses despite being advised by the defendant and/or the counsel in charge to do so. The plaintiff had also failed to mitigate its loss, if

any, by accepting a settlement which was proffered at a time when all the defendants in the 193 Suit had either died, absconded overseas or was bankrupted. Instead it opted to proceed for full trial against the first defendant who was a bankrupt at the material time.

[8] The witnesses who were called to testify during the trial were as follows:

Witnesses		
Plaintiff's witness		Witness Statement
SP 1	Mr Uthaya Kumar a/l Marimuthu	KS/SP 1
SP 2	Mr Leong Tuck Onn	KS/SP 2
SP 3	Ms T Maliga Chitty a/p V Taivenaigum Chitty	KS/SP 3
Defendant's witness		Witness Statement
SD 1	Mr Nantha Balan a/l E S Moorthy	KS/SD1
SD 2	Mr Shahul Hameed Amirudin	KS/SD2
SD 3	Mr Khairuzzaman Muhammad	KS/SD3
SD 4	Ms Tricia Mallika Appaduray	KS/SD4
SD 5	Ms Rajashree a/p Suppiah	KS/SD5

[9] Section 102 of the Evidence Act 1950 states that the burden is on the party who would fail if no evidence is given by either party. Since both parties called witnesses; the burden of proof is on the plaintiff and on a balance of probabilities ie to show that its case is more probable than the defendant's defence. See *Selvaduray v Chinniah* [1939] 1 MLJ 253.

[10] As such, the outcome of the plaintiff's claim would depend upon the evidence produced by the parties and the credibility of the witnesses called to testify.

[11] That the burden of proof is on the plaintiff is trite law. See also *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673 per Low Hop Bing J at pp 676–677 as follows:

> Under s 101(1) of the Evidence Act 1950, whoever desires the court to give judgment as to any legal right or liability, dependent on the facts he asserts, must prove those facts exist. In order words, the plaintiff must prove such facts as the plaintiff desires the court to give judgment as to its right to claim against the defendant or defendant's liability to pay the plaintiff. The burden of proof is on the plaintiff: s 101(2). In order to succeed here, the plaintiff must prove its claim affirmatively.

[12] As such the plaintiff must prove negligence as alleged in para 8(a)–(r) of its statement of claim, and it has to do so on a balance of probabilities ie that the defendant had breached its duty of care to the plaintiff. The plaintiff submits

and this court accepts that the standard to be exercised by the defendant is the standard of the ordinary skilled man exercising and professing to have that special skill. *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593; [2007] 1 CLJ 229.

[13] In the case of *Ng Poh Kwong v Tan Chuan Yong & Ors* [2013] 7 CLJ 735, Justice Lau Bee Lan states and this court adopts the following in regard to the breach of the duty of care:

> [19] For the test of whether there was a breach of duty of care, this court is guided by the House of Lords case in *Caparo Industries Plc v Dickman and Others* [1990] 1 All ER 568 approved by the Court of Appeal in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585, namely the three criteria of foreseeability of damage, proximity of relationship and the reasonableness or otherwise if imposing the duty in conjunction with the line of cases respecting the standard of care expected of solicitors on the advices that they give to their clients (per Kang Hwee Gee J (as he then was) in *Maelstrom Resources Sdn Bhd & Anor v Shearn Delamore & Co And Another Case* [2007] 1 CLJ 50 at p 68 para 59). In *Maelstrom Resources Sdn Bhd*, the plaintiff brought an action against the defendant, a firm of advocates and solicitors for negligence based on two legal opinions of the defendant regarding the patentability of an invention.
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> [20] The 'line of cases' respecting the standard of care expected of solicitors referred to by the learned judge at pp 64–67 included principles of:
>
> (i) A solicitor holds himself out to his clients as having adequate skill and knowledge property to conduct business that he undertakes, whether contentious or non-contentious;
>
> (ii) a solicitor is not guilty of negligence if he has merely acted upon his client's instructions in reasonable belief that they were correct, or if he has fully explained the position to his client and is nevertheless instructed to judgment, or merely because he has committed an error of judgment, whether on matters of discretion or of law, for example on points of new occurrence or of doubtful construction.
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> (*Halsbury's Laws of England: The Law of Solicitor's Negligence*, para 152 and para 153, 4th Ed Reissue);
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> (iii) A solicitor has a duty to warn client of risks he is facing.
>
> [21] Further in *Victor Cham & Anor v Loh Bee Tuan* [2006] 5 MLJ 359; [2006] 3 CLJ 770 the Court of Appeal at p 368 [MLJ] p 782 [CLJ] of the report, examined the scope of duty of a solicitor toward his client by referring to *Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp* [1978] 3 All ER 582 at p 583:
>
> Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practicing a highly skilled and exacting profession, but I think that the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it on

himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v Beuselinck*, *Griffiths v Evans* and *Hall v Meyrick* demonstrate that the duty is directly related to the confined of the retainer.

[14] In the case of *Maelstrom Resources Sdn Bhd & Anor v Shearn Delamore & Co And Another Case* [2006] MLJU 473; [2007] 1 CLJ 50, Justice Kang Hwee Gee stated the following :

Breach of the Duty of Care — Generally

[52] As to what constitutes a breach generally, see the well-known dictum of Baron Alderson in *Blyth v Birmingham Waterworks Co* [1856] 11 Exch 781784:

The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man not do.

[15] In *Halsbury's Laws of England*, Vol 44, (4th Ed), at para 136:

A solicitor is not guilty of negligence if he has merely acted upon his client's instructions in the reasonable belief that they were correct, or if he has fully explained the position to his client and is nevertheless instructed to proceed.

[16] In *Mohd Nor Dagang Sdn Bhd v Tetuan Mohd Yusof Endut* [2001] 5 MLJ 561; [2001] 2 CLJ 364 Abdull Hamid Embong J at the headnotes at p 365 essentially held:

[3] Based on the authorities, the defence of limited immunity was applicable to the defendant as the acts complained of as purportedly giving rise to negligence were acts preparatory to and so intimately connected and akin to the actual conduct of the case in the Temerloh suit.

[4] ... the court maintains the view that an advocate and solicitor who holds himself as possessing reasonable competence in his vocation owes a duty to his client to exercise that duty with reasonable care and competence. Events may turn out to prove that an advocate and solicitor had been wrong in making a decision but this does not mean that he has been negligent. His is only a duty to exercise reasonable care and competence.

[17] This principle had been established as far back as the 19th century in the English case of *Purves v Landell* (1845) 12 Cl & Fin 91 where Lord Brougham at p 103 held that:

But it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even failing into what must be considered a mistake.

A You can only expect from him that he will be honest and diligent; and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible that you could ever have a class of men who would give a guarantee, binding on themselves, in giving legal advice and conducting suits at law, to always be right.

B

[18] In *Sri Alam Sdn Bhd v Tetuan Radzuan Ibrahim & Co (sued as a firm)* [2010] 1 MLJ 284:

C ... it is now accepted that advocates and solicitors owe concurrent duties in contract and in tort (*Midland Bank Trust Co Ltd & Anor Hett, Stubbs & Kemp (a firm)* [1979] Ch 384: *Saif Ali v Sydney Mitchell*). Their duty to exercise reasonable degree of care and skill is with all professions. He or she is to be judged by what reasonably competent practitioners would do although a lawyer is to be judged according to the standards of practitioners of his own standing and seniority.

D In court proceedings we often see advocates, who have exercised reasonable care and competence, taking diametrically opposite views. It will then become the function of judges to decide which view is the correct one. The view is that is not accepted may be considered wrong. The fact that one view turns out to be wrong does not mean that the advocate has been negligent. In the same vein, it is also not unusual to find that judges who had held a particular view be later found to be incorrect E when the matter is taken up and, decided on appeal. In other words, there is really no duty to be right, only to ensure that one acts with integrity and diligence in exercising reasonable care and still that is expected of him or her.

F In the instant case, I do not think there was any breach of duty on the part of the defendant, I think SD1 had quite appropriately and justifiably raised fairly persuasive arguments which any reasonable competent practitioner would have done. It was unfortunate for him and the plaintiff in this case that the learned judge did not did it in their favour. It was a matter, to my mind, which could have gone either way, as it sometimes happens in the court of law. It was a judgment call.

G **[19]** Applying the facts as adduced by the evidence to the law, the court finds that since the defendant as solicitors have properly instructed their counsel in the conduct of the trial and counsel ie SD4 and SD5 have not been shown to be incompetent or glaringly wrong, therefore neither the defendant as solicitors or as counsel could be said to be negligent.

H

[20] In regard to para 5(a) above, this court finds the allegation that the defendant failed to give legal advice regarding the steps that should be taken and the required preparation for the purpose of a full trial remains not only unproven, but rebutted based upon the evidence of SD5 who had handled the I 193 Suit from 2004 until 12 April 2007.

[21] SP1 who is legally qualified in his evidence confirmed that he did have knowledge of legal matters and court procedures and that he did require external lawyers to seek his instructions at every stage of the litigation process.

[22] This court finds no reason not to accept the evidence of SD5 who had stated that when she was assigned the file for trial all the cause papers and bundles of documents had been prepared upon the client's instructions and confirmation and had been properly filed in court. SD5 had also stated that she had discussed the upcoming trial and obtained instructions from SP1.

[23] In regard to the plaintiff's allegation in para 5(b) above that there was failure on the part of the defendant to call relevant witnesses despite discussing the matter with the defendant's partners SD2, SD1 and SD5, this court has perused the relevant evidence and finds that there is no truth to this allegation. To the contrary this court finds no reason not to accept the evidence of the defendant's witnesses that it was the plaintiff and in particular SP1 who was to secure the attendance of the witnesses for Suit 193.

[24] In regard to the plaintiff's allegation in para 5(c) above that there was failure to advise the plaintiff regarding the effect of primary and secondary evidence in producing documents at trial, this court finds ample evidence to the contrary in that SD5 had testified that she had advised SP1 about the necessity of tendering the original sales and purchase agreements to court during the pre-trial meeting in March 2005.

[25] Furthermore this court finds that the plaintiff's allegation in para 5(d) above that there was failure to advise SP1 to give an explanation as to why the original sales and purchase agreements of the two units could not be produced, to be a non-starter for clearly SP1 did give an extensive explanation when questioned by the learned judge Mohamed Hishamuddin Yunos J on 22 March 2005 as to why at that point of time the originals of the sales and purchase agreements could not be produced or for that matter precisely located.

[26] In regard to the alleged failures in para 5(e) and (k) pertaining to the requirements under the Evidence Act, this court can find no veracity in these allegations. Based upon SP1's evidence that the sales and purchase agreements for Unit A10-4 had been lost the learned judge marked the photostat copy of the sales and purchase agreements as exh 'P2'. In regard to the sales and purchase agreements for Unit A5-4 based on SP1's evidence that the original may be with the Bank of Commerce the learned judge had marked the sales and purchase agreements as exh '1D3'.

[27] Neither can the court find any veracity in the plaintiff's allegation in para 5(f) above that the defendant had failed to advise SP1 to give an explanation to the court regarding the real transaction of the ownership of the Units A5-4 and A10-4. In SP1's witness statement he clearly sets-out his explanation in regard to the two units.

[28] The allegations in para 5(g) and (h) are inter-related. However the court finds them to be baseless because SP1 in his witness statement had explained regarding the strata titles for the two units having not been issued.

[29] The allegations in para 5(i), (j) and (o) are all found by this court to be without substance. Following on from the result of SP1's testimony in court during the 193 Suit, SP1 was advised by SD5 to procure the original sales and purchase agreements for Unit A5-4 which at that stage of the proceedings was still marked as ID3, and it was therefore incumbent upon SP1 to do so, which he did not.

[30] As regards, the allegation (ie para 5(l)) that the defendant had failed to call other witnesses since SP1 did not have personal knowledge of the facts in the Suit 193, SP1's evidence was that he had unlimited access to records and documents of the plaintiff. In addition the plaintiff had in response to the defendant's request reverted on 1 July 2002 that there would be four witnesses testifying on behalf of the plaintiff including SP1 and Ms Shikha Dutt. However when the trial was to have commenced only SP1 was made available by the plaintiff, having not been able to secure the attendance of the three others.

[31] In regard to para 5(m)–(n) ie the alleged failure of the defendant to take appropriate steps to obtain the original sales and purchase agreements from the Bank of Commerce/developer and thereby to produce same before closing its case, it is clear from the evidence that it had always been the understanding that it was SP1's responsibility to obtain the original sales purchase and agreements from the Bank of Commerce. Neither had SP1 informed the defendant that he was either unwilling or unable to obtain the sales purchase and agreements from the bank. And the evidence as it unfolded during trial suggests that SP1 only obtained the original of the sales purchase and agreements after the completion of Suit 193. If SP1 had the sales purchase and agreements during the trial of Suit 193, there would then be no necessity to call witnesses from the Bank of Commerce and/or the developer. There is exh P1 ie letter dated 12 April 2005 from Messrs Megat Najmuddin Leong & Co purportedly forwarding the sales purchase and agreements, but the evidence is that it was never shown or informed to any member of the defendant prior to the date of trial on 25 May 2012.

[32] Based upon the totality of the evidence, it is the finding of this court that the plaintiff's allegation that the plaintiff's had informed that they were in possession of the original sales purchase and agreements for Units A5-4 since April 2005 lacks veracity. If this be true then why did the plaintiff's not hand it over to Messrs De Silva to produce in court when the defendant Dato' Mat Shah Safuan applied to reopen his case. And it has since transpired that the true

purpose of Damansara Reality Bhd requesting for the original sales purchase and agreements and deed of assignment in regard to Units A5-4 was not for the trial but for reassignment.

[33] In regard to para 5(p)–(q) above it is the court's finding that the defendant acting as advocates (ie counsel) and solicitors did exercise a reasonable degree of care and skill, as was required of the ordinary skilled advocate and solicitor professing to have and to exercise that skill. There is no evidence put forward by the plaintiff that the defendant had failed to research and analyse the relevant law relating to the issues in Suit 193 prior to full trial. The court' reiterates that it is not the law that the defendant, their lawyers or counsel have a duty to be right, and while they have a duty not to be glaringly wrong (see *Clerk & Lindsell on Torts* (19th Ed), p 614), the court does not find any evidence to suggest that they were glaringly wrong.

[34] The fact that the plaintiff had instructed Messrs De Silva and Co to proceed with an appeal to the Court of Appeal leads the court to the inevitable conclusion that the plaintiff could not have been dissatisfied with the skill and performance of the defendant as advocate and solicitor but was dissatisfied with the conduct of the case and the ultimate decision of the learned judge who had heard and disposed of S3–193 of 1996. By conduct of the case this court takes it to mean the events that occurred during trial that were beyond the control of the defendant and the result of the plaintiff's own doing.

CONCLUSION

[35] Based on the above it is my decision that the plaintiff has failed to prove its case of negligence against the defendant on a balance of probabilities. The court therefore rule in favour of the defendant and in doing so I dismiss the plaintiff's claim with costs of RM60,000.

ORDER

[36] So ordered accordingly.

Claim dismissed with costs of RM60,000.

Reported by Kanesh Sundrum